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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN A. WEBB & BROTHER, A FIRM COMPOSED OF JOHN A. WEBB AND JOSEPH W. WEBB.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED JUNE 24, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 24, 1891.

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1 At a term of the circuit court of the United States in and for the western district of Texas and holding its session at Austin, Texas, and which term begun on the 3rd day of February, A. D. 1890, and continued in session until the 4th day of March, A. D. 1890, there came on to be heard, amongst other causes, the following:

THE MOLINE PLOW COMPANY, Plaintiff,
vs. No. 2182.
JOHN A. WEBB & BROTHER, Defendants.

2. Plaintiff's original petition was filed in court on the 31st day of October, 1889, and is as follows:

In the U. S. Circuit Court, West. Dist. of Tex., at Austin, Feb. Term, 1889.

To the hon. judges of the circuit court of the United States in and for the western district of Texas:

The petition of the Moline Plow Company, hereinafter styled plaintiff, complaining of John A. Webb and Jos. W. Webb, defendants, shows unto the court—

1. That plaintiff is a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and has its principal office in Rock Island county, of said State of Illinois, and the defendants reside in and are citizens of the county of Travis, State of Texas.

2. That heretofore, to wit, on the 21st day of January, A. D. 1882, defendants, and each of them, did make, execute, and deliver to S. W. Wheelock their three (3) certain promissory notes in writing, bearing dates on the 21st day of January, 1882, in each of which said notes defendants and each of them did promise to pay said S. W. Wheelock or order the sum of two thousand dollars ($2,000), with interest thereon from date till paid at the rate of eight 2 per cent. per annum, said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, which said sums of $2,000.00 in each note stipulated were due and payable respectively on the 1st day of November, A. D. 1885, the 1st day of November, A. D. 1886, and the 1st day of November, 1887.

3. That subsequent to the execution and delivery of said notes to said S. W. Wheelock as aforesaid and prior to their maturity, the said S. W. Wheelock did, in due course of trade, endorse said notes to plaintiff, who now owns and holds the same.

4. That by reason of the execution and delivery of said notes to said Wheelock and his said endorsement to plaintiff as aforesaid the defendants and each of them did promise to pay to said Wheelock and to plaintiff, his endorsee, the full sums in said notes stipulated according to the legal tenor and effect thereof.

5. That upon said notes the defendants have paid the sums as follows: Six and $\frac{48}{100}$ ($6.48) dollars on the 19 day of October, A. D. 1883, and two hundred and fifty dollars on the 3rd day of Feb-

ruary, 1888, and two hundred and fifty dollars (250) on the 15th day of September, 1888.

6. That though said notes were long since due the defendants have paid no part thereof except as above, and have refused and still refuse to pay the balance thereon due, tho' often requested to pay same by plaintiffs, to their great damage twelve thousand dollars.

7. Wherefore, premises considered, plaintiff prays that defendants and each of them be cited to answer this petition at the next regular term of this court; that upon final hearing it have judgment for its debt, interest, and costs of suit, and for such relief, general and special, as the nature of the case may demand. As in duty, &c.

WEST & McGOWN,
Att'ys for Pl'ff, Moline Plow Co.

3 (Endorsed:) No. 2182. Moline Plow Co. *vs.* Jno. A. Webb
et al. Pl'ff's original petition. Filed Octo. 31, 1889. D. H. Hart, clerk.

2½. Thereupon following citations were issued:

Citation to John A. Webb.

In the United States Circuit Court for the Western District of Texas, at Austin.

The President of the United States of America to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon John A. Webb, a resident citizen of the county of Travis, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next regular term thereof, to be holden in and for the western district of Texas, at the court-room thereof, in the city of Austin, on the first Monday, it being the third day, of February next, to answer the petition in case No. 2182, filed on the thirty-first day of October, 1889, of The Moline Plow Company, plaintiff, against John A. Webb and J. W. Webb, defendants. The nature of the plaintiff's demand is as follows, to wit:

An action on (3) three certain promissory notes, of date January 21st, 1882, for the sum of two thousand dollars each, due respectively on the first day of Nov., 1885, first day of Nov., 1886, and the first day of Nov., 1887, executed by the said defendants, J. A. Webb and J. W. Webb, to S. W. Wheelock, and subsequent to their execution and delivery and prior to their maturity endorsed by the said Wheelock to the plaintiff, The Moline Plow Company, less credits as follows: Six & $\frac{48}{100}$ dollars, paid on the 19th Octo., 1883; two hundred and fifty dollars, paid on the 3rd day of February, 1888, and two hundred and fifty dollars, paid on the 15th day of
Sept., 1888; for interest at the rate of 8% per annum, for
4 damages in the sum of twelve thousand dollars, and for costs
of suit; all of which will more fully appear from plaintiff's
original petition, now on file in this office, of which you will serve the said John A. Webb, and with a true copy of this writ.

Herein fail not and due return of this writ make, showing how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Austin, Texas, this first day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of American Independence the 114th year.

D. H. HART,
Clerk of said Circuit Court.

(Endorsed:) No. 2182. U. S. circuit court, western district of Texas, at Austin. The Moline Plow Co. *vs.* Jno. A. Webb & Bro. Citation to John A. Webb, Travis county. Issued on the first day of November, A. D. 1889. D. H. Hart, clerk. Returned & filed on the 2nd day of November, A. D. 1889. D. H. Hart, clerk.

Marshal's Return.

Received this writ on the 1st day of November, 1889, and I executed the same on the 1st day of November, 1889, by delivering to the within-named defendant, John A. Webb, in person, a true copy of this writ.

PAUL FRICKE,
U. S. Marshal, W. D. T.,
By D. C. PACE, *Deputy.*

Fee, $2.00.

Citation to J. W. Webb.

In the United States Circuit Court for the Western District of Texas, at Austin.

The President of the United States of America to the marshal of the western district of Texas, Greeting:

5 You are hereby commanded to summon J. W. Webb, a resident citizen of the county of Travis, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next regular term thereof, in the city of Austin, on the first Monday, it being the third day, of February next, to answer the petition in case No. 2182, filed on the thirty-first day of October, 1889, of The Moline Plow Company, plaintiff, against John A. Webb and J. W. Webb, defendants. The nature of plaintiff's demand is as follows, to wit:

An action on (3) three certain promissory notes, of date January 21st, 1882, for the sum of two thousand dollars each, due respectively on the first day of Nov., 1885, first day of Nov., 1886, and the first day of Nov., 1887, executed by the said defendants, J. A. Webb and J. W. Webb, to S. W. Wheelock, and subsequent to their execution and delivery and prior to their maturity endorsed by the said Wheelock to the plaintiff, The Moline Plow Company, less credits as follows: Six & $\frac{48}{100}$ dollars, paid on the 19th Octo., 1883; two hundred and fifty dollars, paid on the 3rd day of February, 1888;

and two hundred and fifty dollars, paid on the 15th day of Sept., 1888; for interest at the rate of 8% per annum, for damages in the sum of twelve thousand dollars, and for costs of suit; all of which will more fully appear from plaintiff's original petition, now on file in this office, of which you will serve the said J. W. Webb, and with a true copy of this writ.

Herein fail not and due return of this writ make, showing how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Austin, Texas, this first day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of American Independence the 114th year.

D. H. HART,
Clerk of said Circuit Court.

6 (Endorsed:) No. 2182. U.S. circuit court, western district of Texas, at Austin. The Moline Plow Co. *vs.* John A. Webb & Bro. Citation to J. W. Webb, Travis county. Issued on the first day of November, A. D. 1889. D. H. Hart, clerk. Returned and filed on the 4th day of November, A. D. 1889. D. H. Hart, clerk.

Marshal's Return.

Received this writ on the 1st day of November, 1889, and I executed the same on the 4th day of November, 1889, by delivering to the within-named defendant, J. W. Webb, in person, a true copy of this writ.

PAUL FRICKE,
U. S. Marshal, W. D. T.,
By D. C. PACE, *Deputy.*

Fee, $2.00.

3. Thereafter the defendants, on the 30th day of January, 1890, filed their original answer in court, which is as follows:

Original Answer.

THE MOLINE PLOW CO.
vs. } No. 2182.
JNO. A. WEBB & BRO.

And now come the defendants and demur to plaintiff's petition, because the matters and things as therein alleged are insufficient in law and constitute no cause of action against these defendants, and of this they pray the judgment of the court.

SNEED, PENDEXTER & BURLESON,
SHEEKS & SHEEKS,
Att'ys for Defendants.

And, for answer in this behalf, defendants deny all and singular the allegations in plaintiff's petition contained and demand strict proof of the same, and of this they put themselves upon the country.

SNEED, PENDEXTER & B.,
SHEEKS & SHEEKS,
Att'ys for Def'ts.

7 And for further answer these defendants say that if plaintiff ever had any cause of action against them on the notes described in their petition that the right of action thereon accrued more than four years prior to the institution of this suit, and that the same is now barred by the statute of limitation of four years, which defendants now here plead. Wherefore defendants pray the judgment of the court that plaintiff take nothing by this suit, and that they go hence and recover all costs.

SNEED, PENDEXTER & BURLESON,
SHEEKS & SHEEKS, *Att'ys for Def'ts.*

(Endorsed:) No. 2182. The Moline Plow Co. *vs.* John A. Webb & Bro. Orig. answer. Filed January 30th, 1890. D. H. Hart, clerk.

And afterwards, to wit, on the 12th day of February, 1890, under leave of court plaintiffs filed in court their first supplemental petition by way of response to the original answer of defendants, which is as follows:

Plaintiff's 1st Supplemental Petition.

In U. S. Circuit Ct. for West. Dist. of Texas, Sitting at Austin, Texas.

MOLINE PLOW CO.
vs. } No. 2182. Law.
JNO. A. WEBB & BRO.

Now comes the plaintiff, leave of court being first obtained, and files this its first supplemental petition in response to the defendants' original answer, and, so responding, plaintiff says:

1. For the purpose of answering the plea of statute of limitations of four years, a part of the answer of these defendants, this plaintiff alleges as follows:

8 (*a.*) That, as already averred in the original petition on file in this cause, these defendants did make, execute, and deliver unto S. W. Wheelock the notes sued on in this cause, and which notes are now hereto attached and marked Exhibits X, Y, and Z respectively, and for all purposes of pleading are now prayed to be considered a part of this supplemental petition, and, as will appear from the face of each of said notes, there is the following stipulation in each, viz: "With interest from this date" (Jan. 21, 1882) "till paid, at the rate of eight per cent. per annum, said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectable. This note is secured by a deed of trust this day

executed by us." (Jno. A. Webb and J. W. Webb, defendants) " to E. A. Wright, trustee, on 10 feet off of the east side of lot No. 3, all of lot No. 4, and 23 feet off of the west side of lot No. 5, all in block No. 68, East Pecan s'r't, in the city of Austin ; " and the plaintiff would further aver that, as stipulated in said notes as above set out, the defendants did secure the same by executing, on said Jan. 21, 1882, the date of the execution of said notes, their certain deed of trust above described, and which deed is now hereto attached, marked "Exhibit A," and now prayed to be considered for all purposes a part of this supplemental petition, and which said deed of trust as above alleged was a contemporaneous instrument with said notes, and as appears from the face of said trust deed there is contained, after describing said notes and the tenor and terms of each, the following stipulations, viz: "Provided, however, it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable, then the whole
debt, as well as the interest, shall become and be due and pay-
9 able; and, further, it is understood and agreed that if said
note first falling due shall remain unpaid thereafter for as
much as six months, then the whole debt is to be and become due and payable, and this trust in either event to be executed and foreclosed at the option of said third party " (that is to say, the holder of said notes, this plaintiff).

Wherefore under these premises doth this plaintiff charge the fact to be that said notes in fact only become due and payable on Nov. 1, 1885, Nov. 1, 1886, and Nov. 1, 1887, respectively, and at no other time unless at the option of the owner and holder of said notes; and these plaintiffs aver that said option never having been exercised by the plaintiff, the holder and owner thereof, under the provision of said notes and deed of trust, that the statutes of limitations plead by the defendants could not become a bar as to said notes until four years after Nov. 1, 1885, Nov. 1, 1886, Nov. 1, 1887, respectively, said option never having been exercised, and in fact by its long delay the plaintiff could not exercise said option.

(*b.*) And further in this connection plaintiff alleges that as a matter of fact the defendants gave plaintiff no notice of the fact that they desired said option to be enforced, even if by giving such notice the defendants could enforce such option, which is not admitted, but expressly denied; nor did said defendants in any manner notify plaintiff that they would take advantage of this forfeiture if in fact said defendants could do so, which is not admitted, but said defendants did in fact acquiesce in said notes as being live obligations and did recognize the same to be due and outstanding by the two several payments of $250.00 each made on Feb. 3 and Sept. 15, 1888, respectively, said payments being made by the defendants and received and accepted by the plaintiff for the sole purpose of giving the defendants further time for adjusting and settling with plaintiff said notes, and said payments being especially based on the agreement
of the defendants hereto attached, marked "Exhibit B," and
10 which agreement was accepted by plaintiff and prayed to be
considered a part of this supplemental petition, in which, by

payment at said dates above mentioned of said sums, the defendants were to have until Jan. 1, 1889, to raise $1,000 to liquidate the note, and suit was to be stayed by plaintiff in order to give def'ts time to comply with said agreement, which notes in said agreement was stated to be due Nov. 1, 1885. Wherefore, by reason of said agreement and said payments and the acquies-ence of defendants and the failure on their part to notify plaintiff of their intention to take advantage of such forfeiture, if in fact there was a forfeiture which they could take advantage, the defendants — now estopped from pleading the statutes of limitations of four years, and plaintiff says that by reason of the execution and delivery of said instrument (Exhibit B) the defendants acknowledged the debt herein sued on to be just and due and unpaid and promised to pay same.

And on the matters set out in this supplemental petition plaintiff asks the judgment of the court and further prays as in its original petition; and also plaintiffs prays that in case the court holds the notes to be barred that they have judgment for the full amount of their debt in accordance with said new promise marked "Exhibit B," or for such amount as the court may think from the evidence to be due, and for such other and further relief as in law they may be entitled, &c.

WEST & McGOWN,
Att'ys for Pl't'ff, Moline Plow Co.

EXHIBIT X.

28606.
$2,000. AUSTIN, TEXAS, *January* 21*st*, 1882.

On or before the 1st day of November, 1885, we promise to pay to S. W. Wheelock or order, at Austin, Texas, two thousand
11 dollars, for value received of him, with interest from this date till paid at the rate of eight per cent. per annum, said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectable. This note is secured by a deed of trust, this day executed by us to E. A. Wright, trustee, on 10 feet off of the east side of lot No. 3, all of lot No. 4, and 23 feet off of west side of lot No. 5, all in block No. 68, on East Pecan street, in the city of Austin.

(Signed) JOHN A. WEBB,
J. W. WEBB,
Composing Firm of Jno. A. Webb & Bro.

Due Nov. 1–4, '85.

(Endorsed:) Pay to Moline Plow Co. or order. S. W. Wheelock. Paid Oct. 19, '83, on the within note six & $\frac{48}{100}$ dollars. Paid Feb. 3, '88, on the within note $250.00 *dollars*. Moline Plow Co., by West & McGown, their att'ys. $250.00 p'd on the within note Sept. 15, 1888. Moline Plow Co., by W. & McG.

EXHIBIT Y.

28607.
$2,000. AUSTIN, TEXAS, *January 21st*, 1882.

On or before the 1st day of November, 1886, we promise pay S. W. Wheelock or order, at Austin, Texas, two thousand dollars, for value received of him, with interest from this date till paid at the rate of eight per cent. per annum; said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectable. This note is secured by a deed of trust, this day executed by us to E. A. Wright, trustee, on 10 feet off of the east side of lot No. 3, all of lot No. 4, and 23 feet off of west side of lot No. 5, all in block No. 68, on East Pecan street, in the city of Austin.

(Signed) JOHN A. WEBB,
J. W. WEBB,
Composing Firm of John A. Webb & Bro.

Due Nov. 1-4, '86.

12 (Endorsed:) Pay to Moline Plow Co. or order. S. W. Wheelock.

EXHIBIT Z.

#28608.
$2,000. AUSTIN, TEXAS, *January 21st*, 1882.

On or before the 1st day of November, 1887, we promise to pay S. W. Wheelock or order, at Austin, Texas, two thousand dollars, for value received of him, with interest from this date till paid at the rate of eight per cent. per annum, said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectable. This note is secured by a deed of trust, this day executed by us to E. A. Wright, trustee, on 10 feet off of the east side of lot No. 3, all of lot No. 4, and 23 feet off of west side of lot No. 5, all in block No. 68, on East Pecan street, in the city of Austin.

(Signed) JOHN A. WEBB,
J. W. WEBB,
Composing Firm of John A. Webb & Bro.

Due Nov. 1-4, '87.

(Endorsed:) Pay to Moline Plow Co. or order. S. W. Wheelock.

EXHIBIT B.

AUSTIN, TEXAS, *Feb.* 3, 1888.

West & McGown, Austin, Texas.

DEAR SIRS: We will pay you $250.00 in cash and $250.00 on Sept. 15, '88, if you will stay suit on the Moline Plow Co. claims until

Jan., '89. In the event of our failure to pay $250.00 in Sept. your obligation to stay till Jan. 1, '89, will be at an end. If we do we are to have till Jan. 1, '89, to raise $1,000.00 and take up the first note, due Nov. 1, '85.

(Signed) JNO. A. WEBB & BRO.

13 EXHIBIT A.

STATE OF TEXAS,
County of Travis.

This deed, made and entered into this 21st, day of January eighteen hundred and eighty-two, by and between John A. Webb and Joseph Webb, doing business under the firm name of John A. Webb & Brother, all of the county of Travis, State of Texas, parties of the first part, and E. A. Wright of Rock Island county, State of Illinois party of second part, and S. W. Wheelock of the last-named State and county, party of the third part, witnesseth:

That the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, (the receipt of which is hereby acknowledged) do by these presents grant, bargain and sell, convey and confirm, unto the said party of the second part, the following-described real estate, to wit: All those several parcels or lots of ground situated in the city of Austin Travis county, Texas, being 10 feet off the east side of lot No. 3, all of lot No. 4, and 23 feet off the west side of lot No. 5, all being in block No. 68 in said city of Austin. Fronting on the north side of Pecan street and running back north to the alley together with all houses, erections, improvements, rights, priveleges on or belonging to the same incident or appert*ai*nant thereto to him said second party his heirs or assigns.

To have and to hold the same, with the appurtenances to the said party of the second part, and to his successor hereinafter designated, and to the assigns of the said party of the second part, or of said successor, hereby covenanting to warrant and defend the title to said property, against the claim or claims of all persons whomsoever.

In trust, however, for the following purposes, whereas, the said
first parties are indebted to the said third party in the sum
14 of six thousand ($6,000.00) dollars evidenced by three prom-
is-ory notes of even date with these presents, executed by said first parties to said third party each for two thousand ($2,000.00) dollars and due respectively on the first of November 1885, the first of November 1886, and the first of November 1887, each bearing interest at the rate of eight per cent. payable annually, on the said 21st, day of January of each year; provided however it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable then the whole debt as well as the interest shall become and be due and payable and further it is understood and agreed that if said note first falling due shall remain unpaid thereafter for as much as six months then the whole debt is to be and become due and payable, and this

trust, in either event, to be executed and foreclosed, at the option of said third party.

Now, if the said first parties shall well and truly pay and discharge said several sums of money as they respectively become due and payable according to the tenor and effect of said notes of hand, and according to the terms, stipulations, and agreements of this instrument then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part; but if said money shall not be paid according to the tenor and effect of said several obligations then this deed shall remain in force, and the said party of the second part, or in the event of his death, or absence from the State or from any cause refusal to act, or other disqualification for the performance of the duties of this trust, then, at the request of the holder of said notes, the sheriff of the county of Travis for the time being, (who shall thereupon become the successor of said trustee to the title of said property, and the same become vested in him in trust, for the purposes and objects of these presents, with all the powers, duties and obligations thereof,) may proceed to sell said described property, or any part thereof, at public vendue, to the highest bidder, for cash, at the court-house
15 door of said county of Travis first giving sixty days public notice, of the time, terms and place of said sale, and of the property to be sold, by notice as required for sheriffs' sales and upon such sale, the said party of the second part, or his successor in trust, the sheriff of said Travis county, as the case may be, shall execute and deliver a deed or deeds, in fee simple, of the property sold, to the purchaser or purchasers thereof, (a recital wherein of the request of the holder of said notes that he should proceed to sell, of *of* the posting or publication of said notice, and in case of sale by the sheriff of Travis county, of the happening of any or either of the events making him successor in this trust, shall be received in all courts of law or equity, and to all intents and purposes, as full and sufficient proof thereof,) and shall receive the proceeds of said sale, out of which shall be paid, first, the costs and expenses of executing this trust, including compensation to said trustee, or said sheriff, for his services, and next to the said third party or holder of said note, whatever sum of money may be due thereon and the remainder, if any, shall be paid to the said parties of the first part, or their legal representatives.

And the said party of the second part covenants faithfully to perform and fulfill the trust herein created.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

(Signed) JOHN A. WEBB & BRO. [SEAL.]
Consisting of—
(Signed) JOHN A. WEBB. [SEAL.]
(Signed) J. W. WEBB. [SEAL.]
(Signed) E. A. WRIGHT, *Trustee.* [SEAL.]

16 THE STATE OF TEXAS, }
County of Travis. }

Before me, the undersigned authority in and for the county and State aforesaid, personally came and appeared John A. Webb and Joseph W. Webb, who to me acknowledged that they signed, sealed, and delivered the above and attached instrument in writing for all the uses, purposes, and considerations therein expressed.

Witness my hand and official seal, at office, in the city of Austin, this 21st day of January, A. D. 1882.

(Signed) EDW. W. SHANDS,
[SEAL.] *Notary Public, Travis Co., Texas.*

THE STATE OF TEXAS, }
County of Travis. }

I, Frank Brown, clerk of the county court within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing, with its certificates of authentication, was filed for registration in my office on the 27 day of January, A. D. 1882, at 4.30 o'clock p. m., and duly recorded the 28 day of January, A. D. 1882, at 11.15 o'clock a. m., in the records of said county, in Book No. 35, pages 57.

[SEAL.] Witness my hand and seal of the county court of said county the date last above written.

(Signed) FRANK BROWN,
Clerk County Court, Travis County, Texas,
By THOS. F. NEILL, *Deputy.*

(Endorsed:) Jno. A. Webb & Bro. to E. A. Wright. Trust deed. Filed for record at 4.30 o'clock p. m., 27th day of January, 1882. Frank Brown, cl'k. (Also endorsed:) No. 2182. Law. U. S. circuit court. Moline Plow Co. *vs.* Jno. A. Webb & Bro. 1st supplemental petition. Filed Feb'ry 12th, 1890. D. H. Hart, clerk.

17 5. And afterwards, to wit, on the 12th day of February, 1890, the defendants, under leave of the court, filed their 1st supplemental answer by way of response to the 1st supplemental petition of plaintiffs, which is as follows:

Defendants' 1st Supplemental Answer.

MOLINE PLOW CO. }
vs. } 2182.
JNO. A. WEBB & BRO. }

And now come the defendants, and, with leave of the court first had, file this their first supplemental answer, and by way of reply to the plaintiff's 1st supplemental petition these def'ts say:

First. That the matters therein alleged are insufficient in law to prevent the running of the statute of limitations, and of this they pray the judgment of the court.

Second. These defendants deny that they have ever in any manner acknowledged the notes sued on in this cause to be binding and subsisting obligations on them, and aver the fact to be that both plaintiffs and defendants treated said notes as being due from and after ninety days from the time when the first year's interest became due thereon, to wit, Jan. 2, 1883. Wherefore defendants pray that plaintiffs take nothing by their suit and defendants recover all costs.

Third. Defendants deny that either said notes or said deed of trust give plaintiffs any option as to the maturity of said notes, and aver that if plaintiffs had any option whatever that the same related solely to the sale of the property described in said deed of trust.

Fourth. Defendants say that said notes and said deed of trust provide expressly the contingencies upon the happening of which said notes should mature, and no option is therein given plaintiff to in any manner determine when said notes should mature.

18 Fifth. Defendants say that no part of the interest on said notes was paid within 90 days after the same became due, whereupon said notes both as to principal and interest became due more than four years before the institution of this suit, and right of action thereon is now barred by the statutes of limitations.

Defendants pray that plaintiff take nothing, and that defendants go hence with all costs.

SNEED, PENDEXTER & B.,
SHEEKS & SHEEKS,
For Defendants.

(Endorsed:) No. 2182. Moline Plow Co. *vs.* Jno. A. Webb & Bro. Def'ts' 1st supplemental answer. Filed Feb'y 12, '90. D. H. Hart, clerk.

6. And afterwards, to wit, on the 12th day of February, 1890, there was filed in said cause an agreement which is in words and figures following, to wit:

Moline Plow Co.
vs. } 2182.
Jno. A. Webb & Bro.

We hereby agree to waive a jury in the above cause and submit the same to the court on the questions of law and fact.

SNEED, PENDEXTER & BURLESON,
SHEEKS & SHEEKS,
Attorneys for Defendants.
WEST & McGOWN,
Attorneys for Moline Plow Co., Plaintiff.

(Endorsed:) No. 2182. Moline Plow Co. *vs.* John A. Webb & Co. Filed Feb'y 12, '90. D. H. Hart, clerk.

19 7. And afterwards, to wit, on the 15th day of February, 1890, the following judgment was entered:

MOLINE PLOW CO.
vs. } No. 2182.
JOHN A. WEBB & BRO.

Now, on this the 15th day of February, 1890, this cause coming on for final determination, having been submitted to the court on the pleadings, evidence, and argument of counsel on Feb. 12, 1890, and a jury having been waived in writing, the court found as follows:

First. That the notes sued on were barred by the statutes of limitations of four years.

Second. That the new promise, dated Feb. 3, 1888, applied only to the extent of $1,000.00 from Jan. 1, 1889, and no more, and to that extent was binding on defendants.

Wherefore did the court order, adjudge, and decree that the plaintiff, Moline Plow Company, do have and recover of and from the defendants, John A. Webb and Jos. W. Webb, as individuals and as a firm composed of John A. Webb & Bro., the sum of $1,090.00, with interest at eight per cent. per annum from this date until paid, and all costs of this suit for which plaintiff may have its execution.

8. And thereafter, to wit, on the 15th day of February, 1890, the plaintiff, by its attorneys of record, filed the following motion, viz:

Motion for New Trial.

In U. S. Circuit Ct., Sitting at Austin, in West. Dist. of Texas.

MOLINE PLOW CO.
vs. } No. 2182. Law.
JOHN WEBB & BRO.

20 Now comes the plaintiff and respectfully requests that the court give plaintiff a new trial, and for the following reasons:

1. Said notes are not barred by the statutes of limitations as plead by the defendants.

2. Even if said notes are barred by limitation the new promise embraces and includes the entire debt sued for, and should not be limited to $1,000.00, as was in said judgment given.

3. The judgment rendered in this cause is contrary to the law and the evidence. Wherefore is a new trial asked.

WEST & McGOWN,
Att'ys for Pl'ff, Moline Plow Co.

(Endorsed:) Moline Plow Co. *vs.* J. A. Webb *et al.* Motion for new trial. Filed February 15, 1890. D. H. Hart, clerk.

9. And afterwards, on the 4th day of March, 1890, the following order was had on said motion:

Order on Motion.

THE MOLINE PLOW CO.
vs. No. 2182.
JOHN A. WEBB & BRO.

And now, on this day, came on to be heard the motion of defendants for a new trial in this cause, and, the same having been heard and duly considered, it is ordered by the court that said motion be, and the same is hereby, overruled.

21 10. Thereafter, on the 3rd, day of February, 1891, the plaintiff presented the following petition for writ of error:

UNITED STATES OF AMERICA,
Western District of Texas.

In U. S. Cir. Ct., at Austin, Texas.

MOLINE PLOW CO.
vs.
JNO. A. WEBB & BRO.

To the honorable the justice- of the Supreme Court of the United States:

And now comes the plaintiff in the above numbered and entitled cause, The Moline Plow Company, by West & McGown, its attorneys of record, and complains that in the record and proceedings, and also in the rendition of judgment, in a suit between The Moline Plow Company, plaintiff herein, and John A. Webb & Bro., a firm composed of Jno. A. Webb and Jos. W. Webb, tried in the circuit court of the said United States of America for the said western district of Texas, holding sessions at Austin, Texas, at the February term thereof, in 1890, and in which a judgment was rendered for the sum of $1,090.00 in favor of the said Moline Plow Company on 15th day of February, 1890, manifest error hath intervened to the great damage of said Moline Plow Company:

Wherefore doth the said Moline Plow Company pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WEST & McGOWN,
Attorneys for Plaintiff in Error, Moline Plow Co.

(Endorsed:) No. 2182. The Moline Plow Co. *vs.* Jno. A. Webb & Bro. Petition for writ of error. Filed Feb'y 3, 1891. D. H. Hart, clerk.

22 11. And the said application for writ of error was accompanied by a bond in error, which was approved by the court, a copy of which is as follows:

Supreme Court of the United States, to October Term, 1891.

THE MOLINE PLOW CO., Plaintiff, } No. 2182.
vs.
JNO. A. WEBB & BRO.

Suit pending on law side of U. S. cir. c't for west. dist. of Texas, Austin division.

Know all men by these presents that we, The Moline Plow Co., a corporation with its domicile in Moline, Illinois, and C. H. Earnest and J. L. Shepherd, both of whom reside in Mitchell county, Texas, are held and firmly bound unto Jno. A. Webb & Bro., a firm composed of John A. Webb and Joseph W. Webb, both of whom reside in Travis county, Texas, in the sum of five hundred dollars ($500.00), to be paid to the said John A. Webb & Bro., their executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 5th day of January 1891.

Whereas the above-named Moline Plow Co. hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in said above-entitled action in the United States circuit court in and for the western district of Texas, sitting at Austin, Texas, and rendered at the February term, 1890, of said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named Moline Plow Co. shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MOLINE PLOW COMPANY,
By WEST & McGOWN,
Its Att'ys in This Behalf.

23 Signed and delivered in presence of—
C. H. EARNEST,
JAS. L. SHEPHERD, *Sureties.*

Approved Feb'y 3, 1891.

T. S. MAXEY, *Judge.*

STATE OF TEXAS, }
County of Mitchell. }

I, J. E. Hooper, clerk of the dist. c't in and for Mitchell county, do hereby certify that I regard the foregoing bond as good and sufficient, the sureties thereon being worth said sum over and above their liabilities, and I would approve same if presented to me for my approval: to all of which I certify.

J. E. HOOPER,
Clerk Dist. Court, Mitchell County, Tex.,
[SEAL.] By TOM VAN TUYL, *Deputy.*

STATE OF TEXAS,
County of Mitchell.

I, C. H. Earnest, one of the sureties named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of Texas and a property-holder therein; that I am worth the sum of five hundred dollars ($500.00) over and above all my debts and liabilities and exclusive of property exempt from execution; that I have property in the said State liable to execution of the value of more than five hundred dollars.

C. H. EARNEST.

Sworn to and subscribed before me this the 5th day of Jan'y, 1891.

J. E. HOOPER,
Clerk Dist. Court, Mitchell County, Tex.,
By TOM VAN TUYL, *Deputy.*
[SEAL.]

24 STATE OF TEXAS,
County of ——.

I, Jas. L. Shepherd, one of the sureties named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of Texas and a property-holder therein; that I am worth the sum of five hundred dollars ($500.00) over and above all my debts and liabilities and exclusive of property exempt from execution; that I have property in the said State liable to execution of the value of more than five hundred dollars.

JAS. L. SHEPHERD.

Sworn to and subscribed before me this 5th day of Jan'y, 1891.

J. E. HOOPER,
Clerk Dist. Court, Mitchell County, Texas,
By TOM VAN TUYL, *Deputy.*
[SEAL.]

(Endorsed:) The Moline Plow Co., plaintiff in error, *vs.* Jno. A. Webb & Bro., defendants in error. Writ of error bond. Filed Feb'y 3rd, 1891. D. H. Hart, clerk.

12. And the said petition for writ of error was allowed in due form as follows:

See original writ and allowance, next page.

25 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between The Moline Plow Company, who is plaintiff, and Jno. A. Webb & Bro., a firm composed of Jno. A. Webb and Jos. W. Webb, who are defendants, No. — on the docket of said circuit court of the

United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said Moline Plow Company, who is plaintiff in error herein, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 3rd day of February, in the year of our Lord one thousand eight hundred and ninety-one, and seal — our said circuit court, at Austin, in the 115th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin.

Allowed Feb'y 3, 1891, by—
T. S. MAXEY, *Judge.*

25½ [Endorsed:] In Supreme Court of the United States. Moline Plow Company, pl'ff in error, *vs.* Jno. A. Webb & Bro., def'ts in error. Writ of error to Supreme Court of the United States. Issued 3rd day of Feb'y, A. D. 1891. Filed Feb'y 3, 1891. D. H. Hart, clerk.

26 13. Whereupon citations in error were duly issued and served upon the defendants, as appears from the following copies of same, with returns thereon:

Citation in Error to Jno. A. Webb.

United States of America to Jno. A. Webb, a resident of Travis county and of the western district of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein the Moline Plow Company is plaintiff and you and Jos. W. Webb, composing firm of John A. Webb & Bro., are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 3rd day of February, in the year of our Lord one thousand eight hundred and ninety-one.

T. S. MAXEY, *Judge.*

Test with seal of court at Austin this 3rd day of Feb., A D. 1891.

D. H. HART,

[SEAL.] *Clerk Circuit Court, W. Dist. Texas, at Austin, Texas.*

(Endorsed:) Original. In Supreme Court of the United States. Moline Plow Company, pl'ff in error, *vs.* Jno. A. Webb & Jos. W. Webb, composing firm of Jno. A. Webb & Bro., def'ts in
27 error. Citation in error. Issued 3rd day of February, 1891. D. H. Hart, clerk. Filed Feb'y 13th, 1891. D. H. Hart, clerk.

Marshal's Return.

Received February 12, 1891, at Austin, Texas, and executed this writ same day by delivering a true copy hereof to John A. Webb in person.

PAUL FRICKE,
U. S. Marshal,
By FRED. T. TURNER, *Deputy.*

Citation in Error to Jos. W. Webb.

United States of America to Jos. W. Webb, a resident of Travis county and of the western district of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ or error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein The Moline Plow Company is plaintiff and you and Jno. A. Webb, composing firm of Jno. A. Webb & Bro., are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States, this 3rd day of Feb., in
28 the year of our Lord one thousand eight hundred and ninety-one.

(Signed) T. S. MAXEY, *Judge.*

Test with seal of court at Austin this 3rd day of Feb., A. D. 1891.

(Signed) D. H. HART,

[SEAL.] *Clerk Circuit Court, W. Dist. Texas, at Austin, Texas.*

(Endorsed:) Original. In Supreme Court of the United States. Moline Plow Co., pl'ff in error, *vs.* Jno. A. Webb and Jos. W. Webb, composing firm of Jno. A. Webb & Bro., def'ts in error. Citation in error. Issued 3rd day of Feb'y, A. D. 1891. D. H. Hart, clerk. Filed Feb'y 13, 1891. D. H. Hart, clerk.

Marshal's Return.

Received Feb'y 12, 1891, at Austin, Texas, and executed this writ same day by delivering a true copy hereof to Jos. W. Webb in person.

PAUL FRICKE,
U. S. Marshal.
By FRED. T. TURNER, *Deputy.*

14. Thereafter, on the 9th day of March, A. D. 1891, the plaintiffs, by their counsel, filed in court an assignment of errors, a copy of which is as follows:

MOLINE PLOW COMPANY, Plaintiff,
vs.
JOHN A. WEBB & BRO., Defendants.

No. 2182. Law side, in U. S. Circuit Court for Western District of Texas, Austin Division. In Error to Supreme Court of United States.

29 Now comes the plaintiff, The Moline Plow Company, and respectfully submits and assigns for error as follows:

1. The said circuit court erred in that part of the judgment rendered in this cause wherein it holds that the notes herein sued on were barred by the statutes of limitation at the time same was instituted.

2. Said court further erred, as is clearly manifest from the pleadings in said cause, in holding that said notes were, on their face, barred by the statutes of limitation at the time suit was instituted thereon.

3. Said court further erred, as is manifest from the judgment rendered in said cause, in holding as a matter of law that said notes were, on their face, barred by the statutes of limitation at the time suit was instituted thereon, when, as is apparent from the pleadings and exhibits on file in said cause, the bar of limitation at the time said suit was instituted had not been perfected.

4. The court below erred in not rendering judgment in favor of the plaintiff on the new promise dated Feb'y 3rd, 1888, for the full amount of plaintiff's debt, said promise having been found by the court, as a matter of fact, to have been given by said defendants.

5. The court below erred in not granting the motion for new trial made on the part of the plaintiff for the reasons set out in said motion, and, especially for the two following reasons stated therein, viz., failure on the part of the court to overrule the plea of limitation interposed by defendants, and sustaining the demurrer of defendants to the first supplemental petition of plaintiff in response to

said plea, and, further, in not holding that the new promise plead by plaintiff brought the action without the bar of the statute of limitation.

30 Wherefore, by reason of the errors hereinbefore complained of, the plaintiff in error prays that said judgment may be reversed, and that this honorable court proceed to render such judgment as under the record is just and proper.

WEST & McGOWN,
Att'ys for Moline Plow Co., Plaintiff in Error.

(Endorsed:) No. 2182. The Moline Plow Co., plaintiff in error, *vs.* John A. Webb & Bro., defendants in error. Assignment of errors. Filed M'ch 9, 1891. D. H. Hart, clerk.

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States for said western district of Texas, holding its sessions at Austin, Texas, do hereby certify the above and foregoing to be a true and complete transcript of the record of the proceedings had in said court in the cause numbered No. 2182 on the law side of docket of said court, wherein The Moline Plow Company is plaintiff and John A. Webb & Bro. are defendants, as the same appears from the files and records of said court now in my custody and control.

The Seal of the U.
S. Circuit Court,
Western Dist.
Texas, Austin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Austin, in said district, on this the 22nd day of May, in the year of our Lord one thousand eight hundred and ninety-one.

D. H. HART, *Clerk.*

Endorsed on cover: W. Texas C. C. U. S. No. 1227. The Moline Plow Company, plaintiff in error, *vs.* John A. Webb & Brother, a firm composed of John A. Webb & Joseph W. Webb. Filed June 24, 1891.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, Plaintiff in Error,

versus

JOHN A. WEBB & BROTHER, Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Texas.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR FOR SUBMISSION UNDER RULE 20 OF THIS COURT.

Henry Wise Garnett,
West & McGown,
Of Counsel for Plaintiff in Error,
The Moline Plow Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, Plaintiff in Error,

versus

JOHN A. WEBB & BROTHER, Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Texas.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR FOR SUBMISSION UNDER RULE 20 OF THIS COURT.

Statement.

On October 31, 1889, the Moline Plow Company brought this suit against Webb & Brother to recover the amount alleged to be due on three promissory notes, each being for the sum of $2,000.00, executed by Webb & Brother, January 21, 1882, and due respectively November 1, 1885, November 1, 1886, and November 1, 1887. (Rec., pp. 1 and 2.)

Webb & Bro. answered by general demurrer, general denial, and specially plead the statutes of limitations of four years in bar of the action. (Rec., pp. 2 and 3.)

For the purpose of answering the plea of limitation the plaintiff filed a pleading known in the Texas practice as a first supplemental petition, in which, in substance, was alleged—

(*a*.) A reiteration of the execution of the notes sued on, which original notes were attached to the pleadings as exhibits, and an allegation that on the face of each note was the following stipulation, viz:

> "With interest from this date (Jan. 21, 1882) till paid, at the rate of eight per cent. per annum, said interest being due and payable annually, and if not paid when due to bear same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectible. This note is secured by a deed of trust this day executed by us," &c.

Then follows a brief description of the property securing the notes. This is followed by an averment to the effect that, in accordance with this stipulation in each of the notes, the same were secured by a deed of trust (the original deed is attached as an exhibit) executed at the same time with the notes, and which trust deed contains the following stipulations:

> "Provided, however, it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same has become due and payable, then the whole debt, as well as the interest, shall become and be due and payable; and, further, it is understood and agreed that if the note first falling due shall remain unpaid thereafter for as much as six months, then the whole debt is to become due and payable, and this trust deed to be foreclosed, at the option of the holder of the notes."

The plaintiff therefore claimed that the notes became due only on November 1, 1885, November 1, 1886, and November 1, 1887, respectively, and at no other time, unless at the option of the holder of the notes, which option was never exercised.

(*b*.) Plaintiff further alleged, amongst other things, that Webb & Bro. did in fact recognize said notes as live obligations by two several payments made in 1888, which payments were made by defendants and accepted by plaintiff for the sole purpose of giving defendants further time for adjusting and settling up the notes sued on, the payments being especially based on the agreement attached as an exhibit, in which the defendants, on condition of these payments, were to have until January 1, 1889, to raise $1,000.00 to liquidate the note due November 1, 1885, and suit was stayed in order to give defendants time to comply with the agreement. By reason of these acts on the part of the defendants they were estopped from pleading the statutes of limitations of four years.

Plaintiff further alleged that by the execution and delivery of the last instrument the defendants acknowledged the debt sued upon to be just and due and promised to pay the same. Then follows the necessary prayer. (Rec., pp. 5–11.)

To this pleading seeking to avoid the statutes of limitations the defendants responded as follows: 1st, general demurrer; 2d, denial that they ever recognized the notes to be binding obligations on them; and they aver that both parties treated the notes as due from ninety days from the time when first year's interest became due, viz., January 22, 1883; 3d, denial that any option was given plaintiff as to the maturity of the notes, but that if the plaintiff had any option the same related solely to the sale of the property; 4th, that the notes or deed of trust give any option to the holder; 5th, reiteration of the plea of limitations, averring that no part of the interest on the notes was paid within ninety days after same became due. (Rec., pp. 11 and 12.)

On February 15, 1890, a jury having been waived, the case was tried by the court, who found: 1st, that the notes sued on were barred by the statutes of limitations of four years; 2d, that the new promise, dated February 3, 1888, applied only to the extent of $1,000 from January 1, 1889, and no more, and to that extent was binding on the defendant. Judgment for that amount with interest was rendered in favor of the plaintiff (Rec., p. 13). From that judgment the Moline Plow Company has brought the case to this Court by a writ of error.

Were the Notes Sued on Barred?

The first three assignments of error (Rec., p. 19) may well be considered together, inasmuch as they each relate to the ruling of the court in reference to whether or not the notes sued on are barred by limitation. These assignments are as follows:

> "The said circuit court erred in that part of the judgment rendered in this cause wherein it holds that the notes herein sued on were barred by the statute of limitations at the time same was instituted."
>
> "2. Said court further erred, as is clearly manifest from the pleadings in said cause, in holding that said notes were, on their face, barred by the statutes of limitation at the time suit was instituted thereon."
>
> "3. Said court further erred, as is manifest from the judgment in said cause, in holding that said notes were, on their face, barred by the statutes of limitations at the time suit was instituted thereon, when, as is apparent from the pleadings and exhibits on file in said cause, the bar of limitation, at the time said suit was instituted, had not been perfected."

We submit the following PROPOSITION under these assignments, viz:

The notes sued on and the deed of trust to secure same being in effect one and the same contract, it follows that the notes were not to become due until November 1, 1885, November 1, 1886, November 1, 1887, respectively, except at the option of the holder of the notes, because—

(*a.*) By that recital in the notes themselves to the effect that interest unpaid was to bear like rate of interest as principal.

(*b.*) The deed of trust referred to in each note and executed contemporaneously with them so provides expressly.

(*c.*) The conditions contained in the notes and trust deed as to when the debt shall become due are permissive merely and cannot be taken advantage of by the makers of the notes, being made exclusively for the benefit of the payee.

Statement.

There is hardly any necessity for further statement, perhaps; but, out of abundance of zeal and with the desire that the court may have the matter clearly before it, we will add a little to what has already been stated fully in the introductory statement. Here is a copy of one of the original notes:

"# 28606. $2,000.

AUSTIN, TEXAS, *January* 21, 1882.

On or before the 1 day of November, 1885, we promise to pay to S. W. Wheelock or order, at Austin, $2,000.00 for value received of him, with interest from this date till paid at the rate of eight per cent. per annum, said interest *being due and payable annually, and if not paid when due to bear same rate as principal*, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectible. This note is secured by a deed of trust, this day executed to us by E. A. Wright. trustee, on 10 feet off of the E. side of lot No. 3, all of lot No. 4, and 23 feet off of west side of lot No. 5, all in block No. 68, on East Pecan street, in the city of Austin.

(Signed) JOHN A. WEBB,
J. W. WEBB,
Composing the Firm of Jno. A. Webb & Brother."

The notes themselves, as well as the original deed of trust, were made a part of the pleading of plaintiff, and are set out at length fully in the record (pp. 7–11, inclusive). That portion of the deed of trust to which we especially desire to direct the attention of the court is as follows:

> "In trust, however, for the following purposes: Whereas the said first parties are indebted to the said third party in the sum of ($6,000.00) six thousand dollars, evidenced by three promissory notes of even date with these presents, executed by said first parties to said third party, each for two thousand ($2,000.00) dollars, and due respectively on the 1st of November, 1885, the 1st of November, 1886, and the first of November, 1887, each bearing interest at the rate of eight per cent., payable annually, on the said 21st of January of each year: Provided, however, it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable, then the whole debt, as well as the interest, shall become and be due and payable; and, further, it is understood and agreed that if said note first falling due shall remain unpaid thereafter for as much as six months, then the whole debt is to be and become due and payable, and this trust, in either event, to be executed and foreclosed at the option of the said third party."

As to whether or not these notes, when construed with the deed of trust, in connection with the pleadings of plaintiff in error, seeking to avoid the bar of limitation, are sufficient, is raised as a question of law by the demurrer of defendant to same. (Rec., p. 11.)

Argument on the Limitation Phase of the Case.

The position of plaintiff in error, as maintained in the above proposition, is based primarily on that principle of law so firmly established that it has become axiomatic to the effect that when one or more instruments are executed by the same parties at the same time in reference to the same subject-matter in order to arrive at the intention of the contracting parties, all such writings are to be considered as part and parcel of the same contract and will be construed as such. (See Parsons on Contracts, 6th ed., vol. 2, p. 503, and cases cited there; also p. 698, vol. 1, Sayles' ed. of Rev. Statutes of Texas, for Texas cases.)

Therefore must the notes and the deed of trust executed at the same time with them and referring to them be regarded as one agreement, and an examination of all of them considered as one contract ought to determine when, in fact, the notes were barred. From even a cursory reading of these instruments it will be seen that they were all drawn, as is usual in such cases, for the exclusive benefit of the holder of the notes, and their provisions, therefore, must be considered in reference to that end. Upon certain contingencies, the holder could, if he desired, seek an immediate payment of the entire debt. No doubt the true intent of the parties in reference to the indebtedness and its terms and conditions is fully expressed in the paragraph briefly stating the same from the deed of trust above quoted, and from that we learn in no uncertain language that the terms under which the note was to become due, other than the specific dates when the notes matured, as stated on the face of each, was to be, as stated in the deed of trust, at the option of the holder of the notes. It was argued in the court below and, no doubt, will be contended here that the option is limited to the sale of the property described in the deed of trust. That this is not the proper construction to put upon the language is evidenced, among other things, by the fact that the payee would have the right, under the terms of his deed, to foreclose same any time after the notes became due as therein stipulated, and no option would be necessary. The option must relate to the terms of the debt itself, and not to the deed of trust, for whether or not a foreclosure arises under that deed must depend solely upon the terms and conditions as to the failure to pay the debt, which renders a foreclosure possible. The foreclosure of the deed of trust depends upon the terms of the indebtedness, the debt is not dependent on the foreclosure. The deed of trust is ancillary and collateral only to the debt, and the debt, as to conditions as to when it becomes due, as expressed first in the notes themselves and afterwards as further conditioned in the trust deed, is the sole subject of the contract between the parties. We are further strengthened in this view by the fact that the holder of the notes could, at his own option, have treated them as due and instituted suit thereon, not only at the time stipulated in the notes themselves, but also under those two provisions embraced in the deed of trust, viz., either ninety days after failure to pay the interest due on January 21 of each year, or six months after the first note fell due and remained unpaid.

Nor need we have recourse to the trust deed itself in order to conclude that the time when the notes were to mature was left solely to this holder, he being the beneficiary in the contract. Each note contains this provision: "With interest from date till paid at the rate of eight per cent. per annum, interest being due and payable annually, and if *not paid when due* to bear same rate of interest as principal." This clause, then, provides that if the interest on the notes is not paid when due, by reason of this further indulgence on his part, the makers are willing to pay for the use of money thus become due. This clause bestows upon the makers the privilege of either paying up the interest or letting it run until the principal sum becomes due. We think, therefore, that this clause when engrafted in these notes clearly goes to show that the time when the same were to mature was either to be at the option of the holder or at the specific date stated in each.

There are many authorities which hold that the stipulations of the character stated in the notes and the deed of trust are in their nature permissive, and cannot be taken advantage of by the makers of the instrument, being made exclusively for the benefit of the holders of the notes.

Richardson *vs.* Warren, 28th Fed. Rep., 343, and cases there cited.
Bank *vs.* Gas Company, 14 Fed. Rep., 763.
Lowenstein *vs.* Phelan, 17 Neb., 429.
Railway Co. *vs.* Stonsell, 43 Ark., 275.
Wood on Limitations, pp. 295, 296.

This rule, sanctioned by precedent, we insist should govern in the case at bar. The case in 17th Nebraska, above cited, is precisely in point. In that case Judge Maxwell held "that a provision in a mortgage that if any of the annual interest on any of said notes remained unpaid for thirty days after maturity that the entire debt, all of said described notes, shall immediately become due and payable, and this mortgage may then be foreclosed," did not make the entire debt due unless the mortgagee elected so to declare by instituting an action to foreclose. To the same effect Judge McCrary held in the case of Bank *v.* Gas Co., 14 Fed. Rep. In that case it was decided that the fact that the failure to pay coupons within six months from maturity gave the bondholders the option to sue for both principal and interest does not of itself cause the bonds to mature at the date of such default so as to cause the statute of limitations to run.

Likewise Judge Brewer in the case of Richardson *vs.* Warren, 28th Federal Reporter, 344, says: "A provision in a mortgage that upon default in payment of interest due on any of the notes secured thereby the entire debt shall immediately become due and payable, does not of itself cause the notes to mature so as to start the running of the statute of limitations. The stipulation is permissive only and gives a privilege to the mortgagee."

Counsel for the defendant in error will answer our position in reference to whether the notes sued on are barred by calling the attention of the Court to the case of the Harrison Machine Works *vs.* Reigor, 64 Texas, 89, and contend that the decision of the supreme court of Texas in that case is decisive of this question and hence adverse to the plaintiff in error. We shall, therefore, by way of anticipation, briefly consider this case. This case is the only one to be found in the Texas reports in any way analogous to this present action. While we bow to the well-recognized rule that this court follows as a precedent the decisions of the State supreme court in reference to all matters involving State statutes and local laws, yet we believe in this case the opinion in 64th Texas should not be "blindly followed," to use Lord Kenyon's phrase, for it really decides no question of local or statutory law. There is a broad distinction between following the decision of a State court as to a statute of that State and, as is the question in this case, when in fact a statute of limitation begins to run at all. Here no question is raised as to the Texas statute of limitations of four years, but the sole contention is as to when in fact the action accrued; and this, we insist, is a matter to be determined by a careful examination and construction of the notes and deed of trust, bearing in mind the decisions of other tribunals on analogous questions, just as any other matter that is based on the common law.

Even if the decision by the highest judicial tribunal of the State is binding on this Court in an action like the present, which is based on no question of local law, yet we claim that the case in 64 Texas above referred to is so unlike the case at bar that it should not be regarded either as precedent or authority. That case, as we learn quoting from the opinion, was as follows:

"Eliza M. Hicks and J. Reigor executed to Harrison & Co. two promissory notes, each for $700, one payable January 1, 1879, and the other dated January 1, 1880, and both containing an agreement to the effect that a failure to pay that note when due should mature both notes.

"This suit was commenced upon these notes more than four years after the maturity of the one first falling due, and, the statute of limitations having been plead, the question is: Was suit upon the last barred?"

Now this is all we know of the facts, and, no doubt, the statement is complete. Contrast this with this present action. Here the notes sued on each state that the interest is payable annually, "and if *not paid when due* to bear same rate of interest as principal," which clause, we have already urged, on its face shows that it was in the minds of the contracting parties that it was to be left to the discretion of the payee of the notes when the same should be enforced. Not only this, but the deed of trust itself, executed at the same time and part and parcel of the transaction, clearly evidences that it was left to the option of the owner of the notes when he should declare the same to be due at any time other than that stated on the face of the notes. There are no such features in the Harrison-Reigor case. No question of option could be raised in that case. We therefore ask this Court to compare the two cases fully, and it will be seen that they are not similar. Says Judge Willie: "Here," referring to the case of Harrison *vs.* Reigor, "no option was left to the creditors."

The answer to the plea of the statutes of limitations in this suit is based on the theory that an option in favor of the payees was in the minds of the contracting parties when the notes and deed of trust were executed. A careful reading of the opinion in the Harrison-Reigor case will impress one with the idea that while the notes under discussion in that case in no sense had the option feature, still, in what may perhaps be termed *obiter dicta,* the court held in substance, to use the pointed language of the reporter of that case, in the syllabus:

"When by the terms of a contract option is given to a creditor to bring suit for the entire debt, and he fails to bring such suit, the debtor may possibly be justified in supposing the creditor has elected not to take advantage of the forfeiture, if forfeiture it is, and may be chargeable with knowledge that limitation will *not* be computed as against the entire debt from the date of the failure to make a part payment."

We think, therefore, that if our view be correct, that the contract between the parties was that the notes were to become due at the option of the holder of the notes, that the case in 64th Texas is authority in support of our position, rather than against it, and this, we submit, is the proper view to take of this case, so far as it can have any bearing on the decision of the case at bar.

The case in 64th Texas, above referred to, is based solely on the case of Hemp *vs.* Garland, 45 E. C. L. (42 B.). The facts in that case, in brief, are as follows:

In Hemp *vs.* Garland the declaration stated that in 1832 defendant, being indebted to plaintiff in £330, gave a warrant of attorney for the amount, subject to a defeasance, stating that the warrant was given to secure payment of the above sum by installments, the last of which was payable in 1835, and that in case default should be made in payment of any of the installments the plaintiff should be at liberty to enter up judgment and issue execution, levy, recover, and receive all or so much of the debt as should be unpaid at the time the same as if all the periods of payment had expired by effluxion of time; and thereupon, in consideration that the plaintiff would forbear until the time specified, defendant promised to pay the installments at the time mentioned. The declaration then stated that plaintiff forbore and alleged non-payment of some of the installments. Plea, statute of limitations, and issue thereon. It appeared at the trial that the first default in payment of an installment was made more than six years before action. It was held that the plaintiff might have sued on the first default for the whole amount remaining unpaid, and that therefore the statute was a bar to all installments. This case, it will be seen, has no trust-deed feature in it whatever, and hence, in this respect, equally with the case based upon it as authority, cannot be regarded as a precedent, and, although it is cited by Sergeant Byles in his work on Bills, and perhaps by a few other text writers, after a careful examination we are unable to find a single American case that has recognized it as authority and only one English case. In reference to the case of Hemp *vs.* Garland, Chief Justice Willie says:

> "This case has been somewhat criticised on the ground that the facts brought it within the principle that no one is bound to take advantage of a forfeiture, and that the creditor is not compelled to treat the whole debt as due, and that the decision puts the statute in motion against the creditor's will to defeat his claim. (Wood on Lim., p. 296.) Admitting this to be a correct view, it cannot affect the present case. Here no option was left to the creditor; he was forced to treat the debt as due. It is true he was not obliged to bring suit upon it upon default of payment of the first note; neither is any creditor compelled to sue upon a claim so soon as it becomes due." (64 Tex., 90.)

Mr. Wood, in his work on Limitations of Actions, section 126, thus lays down the rule, and refers especially to the English case of Hemp *vs.* Garland:

> "Where a note or bill is made payable by installments, the statute attaches to and begins to run upon each installment as it becomes due, and, according to the authority of a leading English case, if a bill or note is made payable by installments, with a provision that if one installment fail thereupon the whole sum will become due, the statute will begin to run upon the whole debt from the date of such default. It might be argued, however, that this is at variance with the well-known rule that no one is obliged to take advantage of a forfeiture—a point which does not appear to have been noticed in the argument, and which is entitled to considerable weight in such cases. It would seem, upon a fair application of the last-named rule, that the debtor, by his default, put himself in a position where

his creditor might, *if he elected to do so*, treat the whole debt as due; but it seems somewhat unreasonable to say that he thereby compels the creditor to treat the whole debt as due, so that the statute is, even against the creditor's will, put in motion to defeat his claim. The doctrine of the case referred to would also seem to favor forfeitures, whereas it is usually held that they are odious in law." (See also Banning on Lim., 26.)

No doubt other authorities could be found sustaining the same view; therefore we claim that by reason of the odium the courts justly bestow upon a forfeiture (and to construe these notes as insisted upon by the defendants in error is tantamount to this); by reason of the fact that instruments of the character should be determined most favorably to the obligees (Ingles *vs.* Watkins, 4th Ark., 199), and by reason further that statutes of limitations should be construed, as far as fairly can be done, for the benefit of the rights and obligations which they in effect destroy (Wood on Lim., sec. 5, p. 7)—for all these reasons we insist that this Court is bound to hold that at the time this action was brought the notes were in no sense barred by limitation.

New Promise.

The fourth assignment of error directs the attention of the Court to this ruling of the Court. That assignment is as follows:

"4. The court below erred in not rendering judgment in favor of the plaintiff on the new promise, dated February 3rd, 1888, for the full amount of plaintiff's debt, said promise having been found by the Court, as a matter of fact, to have been given by said defendants."

The proposition stated in this assignment may possibly be more concretely expressed as follows:

The letter of Webb & Brother to the Moline Plow Company offering to pay $250.00 cash and $250.00 on September 15, 1888, provided that company would stay suit until January, 1889, should they pay that sum they were to have till January 1, 1889, to raise $1,000.00 and take up first note due November 1, 1885, is such a new promise that even if the debt is barred will take the same out of the statute, and under its terms the Moline Plow Company were entitled to a judgment for the entire amount of the debt sued for. The new promise is embraced in the following letter:

> "AUSTIN, TEXAS, *February* 3, 1888.
>
> "WEST & McGOWN, *Austin Texas.*
>
> "DEAR SIRS: We will pay you $250.00 in cash and $250.00 on September 15, 1888, if you will stay suit on the Moline Plow Company claim until January, 1889. In the event of our failure to pay $250.00 in September your obligation to stay until January, 1889, will be at an end. If we do we are to have until January 1, 1889, to raise $1,000.00 and take up the first note due November 1, 1885.
>
> "(Signed) JNO. A. WEBB & BRO."

The circuit judge held this letter was a new promise to the extent of $1,000.00 from January 1, 1889, and no more. (Rec., p. 13.)

Argument.

To take the debt out of the statute of limitations by an acknowledgment or promise, a present indebtedness must be admitted which the party is willing to pay or evidence from which an implied payment may be inferred. Art. 3219, Revised Statutes of Texas, is as follows:

> "Art. 3219. Acknowledgment must be in writing. When an action may appear to be barred by a law of limitation no acknowledgment of the justness of the claim, made subsequent to the time it became due, shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be in writing and signed by the party to be charged thereby."

The following are the leading Texas cases bearing on the subject of a new promise:

Krueger *vs.* Krueger, 76 Texas, 178.
Gathright *vs.* Wheat, 70 Texas, 740.
Lange *vs.* Carothers, 70 Texas, 718.
Carlisle *vs.* Hooks, 58 Texas, 420.
Leigh *vs.* Linthicum, 30 Texas, 101.
McDonald *vs.* Gray, 29 Texas, 80.
Dickinson *vs.* Lott, 29 Texas, 172.
Smith *vs.* Fly, 24 Texas, 345.
Mitchell *vs.* Clay, 8 Texas, 443.
Webber *vs.* Cochrane, 4 Texas, 31.
Coles *vs.* Kelsey, 2 Texas, 541.

The general principle above set out is fully recognized, and we will only attempt to cite a few decisions of this Court in addition to the Texas cases cited above:

Sheppard *vs.* Thompson, 122 U. S., 231.
Fort Scott *vs.* Hickman, 112 U. S., 150.
Walsh *vs.* Mayer, 111 U. S., 31.
Randon *vs.* Toby, 11 How., 519 (Texas case).
Moore *vs.* Bank, 6 Pet., 86.
Bell *vs.* Morrison, 1 Pet., 351.
Clementson *vs.* Williams, 8 Cranch, 72.

See also a full discussion of this question in " Wood on Limitations of Actions," chap. VII, especially section 68 and notes and cases there cited.

We are aware that every case where a new promise is relied on to bring the action out of the bar of limitations must, to a certain extent, depend on its particular facts, and therefore no one case can be regarded as a precedent other than laying down the general principle as to all acknowledgments.

Let us take up this new promise itself. The learned judge below was correct in holding, however strict the rule on this subject may be, that the letter from Webb & Bro. was such a new promise. Every unbiased mind will admit this, and we do not doubt for an instant that such will be the view of this Court. What we claim, however, is that the new promise, in the first place, relates to the entire debt, and, if not to the entire debt, then certainly to the note due November 1, 1885. Let us examine more closely this letter and see what is its real meaning. In substance, it says first, if the Moline Plow Company will stay suit on their notes until January 1, 1889, certain payments at certain times will be made on same; and, second, if the last payment is not made at the time stipulated, then the obligation to stay suit until January 1, 1889, is at an end; but if these payments are made, then Webb & Bro. are to have until January 1, 1889, to pay $1,000.00 and take up the first note, due November 1, 1885. The first part of this letter admits that the Moline Plow Company has certain claims against the writers, and that these claims are the notes sued on is sufficiently evident from the fact that the first note, due November 1, 1885, is referred to in the letter. It is true that this is purely a matter of inference; but the decisions on the new promise go so far as to say that under certain circumstances an implied payment may be inferred. Here is an admission of certain claims being due, a request to stay suit on same for a definite time, and this is followed by a sufficient description of one of the notes. We therefore claim that the new promise permeates and includes the entire debt.

There is no need of bringing inference to our aid, however palpable and reasonable it may be, in order to show that, at any rate, the court below should have rendered judgment for the full amount due on the note which matured November 1, 1885. Say Webb & Bro. in this letter: "If we do, we are to have until Jan. 1, 1889, to raise

$1,000.00 and take up the first note, due Nov. 1, 1885." That is to say, in less terse and business-like language, as to this note, they want it understood that if they pay $1,000.00 more this note is to be delivered over to them. They recognize it to be a just and subsisting obligation, but claim, perhaps under some agreement which the record does not disclose, nor is it necessary, the benefit of a discount of a part of the principal and all of the interest if they make the payment of $1,000.00 by January 1, 1889. This, to us, is the fair and reasonable meaning of the language contained in the letter. There is no ambiguity, no uncertainty, to be solved in favor of the debtor. Everything is plain and clear, and, in effect, they say: We owe you a note for $2,000.00, due November 1, 1885, and you have agreed to turn it over to us, provided by January 1, 1889, having made two payments, one cash, $250.00, and one, $250.00, September 15, 1888, we pay you $1,000. Such being the fair meaning to put on the language in any event, the court below should have held, on the demurrer to the plea of the new promise, that there was a good cause of action to the extent of the note due November 1, 1885.

Of the Texas cases cited we wish to call the attention of the Court to the opinions of Chief Justice Moore in the two cases to be found in 29th Texas, viz., McDonald *vs.* Gray, p. 84, and Dickinson *vs.* Lott, p. 179. Both of these cases are based on letters, which, if anything, more indefinite than the letter of Webb & Bro., and yet the new promise, implied only in the Dickinson–Lott case, is upheld by the Court. The following language from the case of McDonald *vs.* Gray is peculiarly pertinent to this case, and, while sustaining our view fully that the whole debt is embraced in the new promise, it is especially in point on the position maintained by us that the note due Nov. 1, 1885, was certainly admitted to be due:

"The only question of the least embarrassment presented by the record of this case is as to the construction and true import of the letter of the appellant, which is claimed by appellee to be an acknowledgment of the justice of that part of the original debt for which he sues. Was the letter intended as a proffer of compromise of a dispute between the parties as to the validity of the note or original debt and appellant's liability for its payment? Was a willingness to pay the principal made upon a condition of the release of the interest? Or was it the purpose of appellant, while he admitted freely and unconditionally the justice of the principal of the debt, to appeal to the appellant's liberality and sense of justice as to the interest? We are unaded in the construction of this letter by the light of the circumstances under which it was written, beyond those developed by its contents. There may have been and probably were circumstances with the aid of which we might easily determine the true import which it bore in the minds of the parties at the time it was written and received. Guided merely by the letter itself and such facts as are in the record, we are led to the conclusion that it was properly construed by the judge in the court below to import an unconditional acknowledgment of the principal of the debt, and therefore furnished a valid cause of action for that amount." (29th Tex., 84).

In conclusion we desire to state that on either horn of the dilemma, whether it be the limitation or the new promise phase of this case, this Court, under the state of the record, is bound to reverse the judgment of the court below, and should adjudge that the cause be remanded for the purpose of rendering judgment in favor of the plaintiff in error, should the court hold the notes are not barred, or for judgment for such amount as, under the new promise, the plaintiff in error is entitled to, and this we respectfully ask may be done.

Henry Wise Garnett,
West & McGown,
Of Counsel for Plaintiff in Error,
The Moline Plow Company.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

No. 1227.

THE MOLINE PLOW COMPANY, PLAINTIFF IN ERROR,

versus

JOHN A. WEBB & BROTHER, DEFENDANTS IN ERROR.

ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTIONS TO DISMISS OR AFFIRM FILED BY DEFENDANTS IN ERROR.

HENRY WISE GARNETT,
WEST & MCGOWN,
Of Counsel for the Moline Plow Company, Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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1.

As to the Statement of the Case.

The statement of the case as made by counsel for defendants in his brief, though somewhat highly colored so as much as possible to support his motions, is, in the main, correct. In addition to same, however, we desire to call the attention of the Court to the following, in reference to the subject-matter of this suit, viz:

That to the supplemental petition of plaintiff, seeking to avoid the statutes of limitations, the *original* notes themselves, as well as the *original* deed of trust, and not copies, as stated on page 3 of brief of counsel for motion, were attached as exhibits and made a part of this pleading (see Rec., p. 5); also that the first paragraph of defendants' first supplemental answer was in the nature of a demurrer to the first supplemental petition of plaintiff, seeking to avoid the plea of limitation. (See Rec., p. 11.)

2.

Argument.

Counsel for motion seem to have lost sight of the fact that this Court has, in many instances, held that where errors were apparent on the face of record, though no exceptions had been reserved at the trial either to admitting or rejecting of testimony or to the rulings of the court in respect to matters of law, that a bill of exceptions was not necessary. In the case before us the defendants plead limitation. To avoid this plea, amongst other things plaintiffs, in response, say that the notes are not barred, as appears from the notes themselves, and attach them to this pleading. Defendants demur and say that the notes are barred, as apparent from an inspection of them. The Court, under its ruling, sustains this demurrer. If the ruling of the Court is based on matter apparent on the face of the record, just as it would have been had a demurrer been sustained to the original petition, certainly a writ of error would lie in each case. The following authorities, amongst others, support our position:

Clinton *vs.* Mo. Pac. R'y Co., 122 U. S., 474.
B. & P. R'y Co. *vs.* Trustees, 91 U. S., 130.
Young *vs.* Martin, 8 Wall., 357.
Rogers *vs.* Burlington, 3 Wall., 661.
Bennett *vs.* Butterworth, 11 Howard, 669.
Slocum *vs.* Pomeroy, 6 Cranch, 221.

The Court, in the case of the Baltimore and Potomac Railroad Company against the Trustees of the Sixth Presbyterian Church (91 U. S., p. 130), affirmed this doctrine, and said: "Errors apparent in the record, it is true, are open to revision, whether the error be made to appear by bill or exception or in any other legal manner."

In the case of Bennett *vs.* Butterworth (11 How., 669), a case which came up on a writ of error to the district court of the United States for the district of Texas, the Court reversed a judgment for errors apparent on the face of the record and said: "And as these errors are patent upon the record, they are open to revision here without any motion in arrest of judgment or exception taken in the district court."

In Young *vs.* Martin (8 Wall., p. 357) the Court uses the following language: "It is true, as asserted by counsel, the object of a bill of exceptions is to make matter of record what would not otherwise appear as such, and that no bill is necessary when the error alleged is apparent upon the record."

In Clinton *vs.* The Missouri Pacific Railway Company (122 U. S., 474) the defendant in error insisted that the case should be dismissed because the ruling of the court was not presented by a bill of exceptions. The Court in its opinion, by way of answer to this, say: "As to the proposition that it cannot be reviewed here for want of a bill of exceptions, that is equally untenable. * * * It is distinctly stated here that the case was dismissed because the appeal was not taken within 60 days from the date of the assessment of damages made by the commissioners. * * * Now, if the facts upon which this decision is made are to be found in what may be properly called the record of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter."

The case of Parsons *vs.* Armour *et al.* (3 Peters, 413) was a writ of error which brought up a record from the district court of Louisiana, in which it appears that both questions of law and fact had been submitted to the court and that the testimony was all sent up in the record. In considering the question as to whether or not the case was properly before the Court, the Court said: "The difficulty is to consider under what character we shall consider the present reference to the power of this Court. If tried strictly as a writ of error, it is certainly not an attribute of this writ, according to the common-law doctrine, to submit the testimony as well as the law of the case to the revision of this Court; and then there is no mode in which we could treat the case but in the nature of a bill of exceptions. * * * But this would often lead this Court to decide upon a case widely different from that acted upon by the court below. * * * The present case is one which may be treated as a bill of exceptions or a case submitted; since giving the utmost force to the testimony in favor of Armour, we are of the opinion that the judgment must be reversed. The doctrine of this case seems to be that when a record consists of the petition, answer, and the whole testimony and judgment of the court, and in which the undisputed evidence upon its most favorable construction is not sufficient to support the judgment, the Supreme Court treated the case as a bill of exceptions or a case submitted.

"A judgment in the circuit court of the United States in an action on a promissory note must be brought to this Court by writ of error and not by appeal." (Jones *vs.* Lovelette, 5 Wall., 579.)

An agreement to waive a trial by jury is sufficient if it appears that the record declares that the case was called for trial by the court, "a jury having been waived in writing." (Fleitas *vs.* Cochran, 101 U. S., 301.)

The cases of Otoe County *vs.* Baldwin, 111 U. S., 1, and Martinton *vs.* Fairbanks, 112 U. S., 670, cited by counsel for motion, it seems are likewise authority for the position maintained by us. Both of these cases, and especially the latter, lay down the rule that where there is no demurrer to the declaration, nor other exception to the pleading, no question of law in the absence of a bill of exception is presented for review; but these cases, as well as all others that we have examined on this subject, intimate in no uncertain terms that when, amongst other things, a demurrer is urged to a pleading, raising purely a question of law, that a bill of exception would be superfluous. Here a demurrer is urged to the plea of the plaintiff seeking to avoid the statute of limitation by agreement. All questions of fact as well as of law are to be determined by the court. The legal sufficiency of the pleading avoiding the plea of limitation is yet to be decided by the court; and, as is evident from the phraseology of the judgment, this is determined by the pleading itself, the facts of which, so far as this matter is concerned, by the demurrer are admitted to be true. The ruling of the court below in sustaining this demurrer is assigned for error. (Rec., p. 19.)

The record in this case being composed, as it is, of the petitions, demurrers, and answers, and a jury being properly waived, and the case submitted to the court both as to questions of law and of fact, and the decision of the court being confined solely to the question of the bar of the statute of limitations, the error, if it be, is error apparent upon the face of the record, and no exceptions having been reserved at the trial, either in respect to the evidence or ruling upon matters of law, it would appear that there is nothing in the case upon which a bill of exceptions properly can be based; therefore the case comes strictly within the doctrine laid down in the decisions of the court which we have referred to, and no bill of exceptions, agreed statement of facts, or special verdict is necessary.

2.

Are not the findings of the court in the nature of a special verdict; and as such, under the rule laid down by this Court, requires no bill of exception to have the error passed on by this court?

A special verdict is one in which the jury find the facts of the case and refer the decision of the cause upon those facts to the court (Mumford *vs.* Wardwell, 6 Wall, 423). In the case at bar the circuit judge, sitting as a jury, found (1) that the notes were barred; (2) that there was a new promise in part; therefore, upon these findings, he gave judgment for the amount covered by the new promise. In addition to the cases already cited, the following also seem to maintain the view that the findings embraced in the judgment in this record are special in their nature and therefore obviate the necessity of a bill of exceptions:

Preston *vs.* Prather, 137 U. S., 604.
Fort Scott *vs.* Hickman, 112 U. S., 150.
Retzer *vs.* Wood, 109 U. S., 185.
Storm *vs.* U. S., 94 U. S., 76.
Suydam *vs.* Williamson, 20 How., 427.
Garland *vs.* Davis, 4 How., 131.

3.

The motion to affirm on the ground that the questions raised by the record have been "repeatedly" adjudicated by this Court adverse to plaintiff in error, in case the motion to dismiss is overruled, must abide the event of that motion, for the two questions raised by the assignments of error, so far as counsel are aware, as here presented, have never been "repeatedly" adjudicated adverse to plaintiff in error. The fact is, such questions have not often, if ever, been passed on by this Court; and when determined, we believe we can show, at the proper time, favorably to the plaintiff in error. However, we understand the practice to be that on motions of this character this Court will not undertake to decide the questions raised by the assignments of error themselves.

We do not dispute the proposition that this Court will not in this proceeding revise the finding of the circuit court upon any question of fact. What we do insist on, however, is that, error of law being apparent on the face of the pleadings, this Court can and should examine into the record and determine whether it will sustain the opinion of the lower court either in holding the notes barred by limitation, or that, having found a new promise, this promise did not extend to the entire indebtedness justly owing by the defendants in error.

We respectfully ask that the motions be overruled.

HENRY WISE GARNETT,
WEST & McGOWN,
Of Counsel for the Moline Plow Company, Plaintiff in Error.

AUSTIN, *Sept.* 21, 1891.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN A. WEBB AND BROTHER, A FIRM COMPOSED OF
JOHN A. WEBB AND JOSEPH W. WEBB.

In Error to the Circuit Court of the United States for the
Western District of Texas.

BRIEF FOR DEFENDANTS IN ERROR.

M. F. MORRIS,
Of Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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*In Error to the Circuit Court of the United States for the
Western District of Texas.*

BRIEF FOR DEFENDANTS IN ERROR.

A.

The suggestion to submit this case on its merits, under Rule 20 of the Court, came to counsel for the defendants in error after he had prepared and printed a motion to dismiss or affirm and a brief in support of that motion, and was just about to file them, and hence it is that he has two briefs in the cause instead of one. In submitting the case under Rule 20, the defendants in error do not waive their motion to dismiss or affirm, but on the contrary insist thereon, and submit that said motions should be granted, as the reasons for the same hold good upon the hearing upon the merits. The point is that there is nothing to review in the case, because there is no bill of exceptions and no equivalent for it; and that, even if the question were open whether, the findings of the court being assumed to be special findings of fact, they are sufficient to justify the judgment rendered by the court, the judgment is so plainly and palpably proper upon these findings that to question it would be frivolous.

B.

This suit, instituted on October 31, 1889, was based upon three promissory notes for $2,000 each, dated January 21, 1882, and due and payable, according to their terms, on or before November 1, 1885, November 1, 1886, and November 1, 1887, respectively (Rec., p. 1). By a collateral agreement in writing made at the same time and embodied in a deed of trust or mortgage to secure the notes, it was expressly provided "that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable, then the whole debt, as well as the interest, shall become and be due and payable; and, further, it is understood and agreed that if said note first falling due shall remain unpaid thereafter for as much as six months, then the whole debt is to be and become due, and this trust in either event to be executed and foreclosed at the option of said third party (the payee in the notes)." (Rec., p. 9.)

The interest on the notes was payable annually (Rec., p. 1). Default was made in the payment of the very first installment, which became due on January 21, 1883. and the default continued for 90 days and upwards, and in fact continued always thereafter (Rec., p. 12); so that, under the terms of the collateral agreement, the whole debt then became due and payable, and the plaintiff became entitled to enter suit upon it.

The defendants thereupon, besides the general issue, pleaded the statute of limitations of the State of Texas, which barred the debt unless suit was brought upon it within four years after it became due and payable. The plaintiffs contended in reply that it was merely the option of the holders of the notes to regard them as due or not, as they thought proper; that they did not become absolutely due and payable upon default in the payment of interest or of the first note, but only that the holders might so regard them; that there was no option on the part of the makers to make them so due and payable, and that in the year 1888, within the period of limitations before the beginning of the suit, the defendants acknowledged the debt by two several payments on account (Rec., pp. 6, 8, 9); and it was claimed that this last amounted to a new promise to take the case out of the operation of the statute of limitations.

As already stated, the case was submitted to the court without a jury; but what proceedings were had upon the trial does not appear. That there was testimony taken would seem to be the plain inference of the statement of the court in its rendition of judgment to the effect that the case was " submitted to the court on the pleadings, *evidence*, and argument of counsel " (Rec., p. 13); and thereupon the court found:

> " First. That the notes sued on were barred by the statutes of limitations of four years.
>
> " Second. That the new promise, dated February 3, 1888, applied only to the extent of $1,000 from January 1, 1889, and no more, and to that extent was binding upon the defendants." (Rec., p. 13.)

and rendered judgment for the plaintiffs against the defendants for the sum of $1,090.

The defendants, however, were not satisfied, and sued out their writ of error.

C.

BRIEF OF ARGUMENT.

1.

The findings of the court are conclusive in this case. Those findings are either general or special. On the part of the defendants, it is respectfully submitted that the findings are merely general findings of the issues in favor of the defendants, except to the extent of $1,000; and general findings of a trial court are not and cannot be the subject of review here.

The issues made by the parties were three: 1st. The general issue, which need not be regarded here. 2d. The plea of limitations. 3d. The question of a new promise. The finding of the court upon the second and third issues was "that the notes sued on were barred by the statutes of limitations of four years," and "that the new promise, dated February 3, 1888, applied only to the extent of $1,000 from January 1, 1889, and no more." These certainly are general findings. They are not determinations of any special facts tending to determine the issues, but general determinations of the issues themselves; and, if they are general findings, the uniform and repeated decisions of this Court are to the effect that they cannot be reviewed here, except i[illegible] m [illegible]s the rulings of the Court made in the progress of the trial.

Norris *vs.* Jackson, 9 Wall., 125.
Cooper *vs.* Omohundro, 19 Wall., 65.
Otoe County *vs.* Baldwin, 111 U. S., 1.
Martinton *vs.* Fairbanks, 112 U. S., 670.
Santa Anna *vs.* Frank, 113 U. S., 339.

And as there are no bills of exceptions, and no rulings of the court during the trial in any way excepted to, there is no review possible in any aspect of the case.

2.

But whether the findings are general or special, they are conclusive of the facts found. Only in the case of special findings can the court review the sufficiency of the facts found to support the judgment.

Mercantile Ins. Co. *vs.* Folsom, 18 Wall., 237.
Dickinson *vs.* Planters' Bank, 16 Wall., 250.
Boardman *vs.* Toffey, 117 U. S., 271.

Now, if these findings are special findings of fact, and they are to be taken as conclusively true, it cannot reasonably be contended that the judgment was not what it ought to have been. It is too plain for argument that the judgment could not have been otherwise than as it is.

3.

We can scarcely suppose that this Court will go behind the findings in this case, whether those findings are general or special. There is nothing on which to base a review of the correctness of those findings. The testimony in the case is not given; nor is there any statement of its purport. There are no exceptions to rulings of the court in the progress of the trial, and it nowhere appears what those rulings were.

But even if we supposed, in opposition to the plain statement of the record, that there was no testimony or evidence in the case, and that the case was submitted upon the pleadings alone and the exhibits which are made part of them, the findings of the court even then are right and proper. It is very evident that the whole alleged indebtedness, under the special terms of the collateral agreement, had become due and payable when the first default of interest occurred, especially as the notes themselves by their terms were payable "on or before" a certain specified time—that is, at any time at the option of the maker. The holder could have brought suit for the whole indebtedness when that default occurred; and the courts of Texas have uniformly held that the statute begins to run from the time when the plaintiff could sue.

Walling *vs.* Wheeler, 39 Texas, 480.

And as to the alleged acknowledgment and new promise contained in a letter written by the defendants, under date of February 3, 1888, if that letter is to be taken as proved merely by being made an exhibit to a pleading, and if there was no other proof on the subject, it is evident that the court was entirely right in restricting the effect of this letter (Rec., pp. 8, 9) to the sum of $1,000. It would be a most violent construction that would torture this letter into an admission of indebtedness and a willingness to pay to a greater extent than $1,000; for, under the decisions of the courts of Texas (Coles *vs.* Kelsey, 2 Texas, 541, is the leading case on the subject), which are in entire harmony and conformity with the doctrine of this Court upon the subject, an acknowledgment of debt, in order to amount to a new promise, must express willingness to pay, and certainly an expression of willingness to pay $1,000 is neither an expression nor an implication of willingness to pay more than $1,000.

4.

It is respectfully submitted, therefore, that if the Court does not dismiss the writ of error in this case upon the motion filed for that purpose, there is no reason why the judgment of the circuit court should not be affirmed.

M. F. MORRIS,
Of Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED.
SEP 15 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN A. WEBB AND JOSEPH W. WEBB, TRADING AS JOHN A. WEBB AND BROTHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Motion on Behalf of the Defendants in Error to Dismiss the Writ of Error Sued out in the Cause; Also Motion to Affirm the Judgment.

M. F. MORRIS,
Of Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1227.

THE MOLINE PLOW COMPANY, Plaintiff in Error,

vs.

JOHN A. WEBB and JOSEPH W. WEBB, Trading as
John A. Webb and Brother.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS.

Motion on Behalf of the Defendants in Error to Dismiss the Writ of Error Sued out in the Cause; Also Motion to Affirm the Judgment.

The defendants in error, John A. Webb and Joseph W. Webb, trading as John A. Webb and Brother, and so sued in this cause, come, by their attorney, M. F. Morris, and move the Court to dismiss the writ of error sued out in this cause by the plaintiff in error; and for grounds of this their motion they say that there are no exceptions apparent in the record and no bill of exceptions, no case stated, no special finding of facts, or other proceeding whatever of any kind whereby this Court can review the judgment rendered in the cause.

And, further, in the event that the Court should deny this motion, the defendants in error come and move the Court that the judgment of the circuit court in the premises be affirmed; and for grounds of this their motion they say that on the record of the case no question is presented that requires argument, and the writ of error sued out must therefore be regarded as sued out frivolously and merely for the purpose of delay.

M. F. Morris,
Attorney for the Defendants in Error.

Brief of Argument in Support of Motion to Dismiss or Affirm.

I.

STATEMENT OF CASE.

The plaintiff in error sued below to recover the amount of three several promissory notes for $2,000 each, alleged to have been given to the plaintiff by the defendants, less credits to the amount of $256.48. The defense was the general issue and the statute of limitations; and this defense was sustained by the circuit court, except as to the sum of $1,000. And the judgment was that the plaintiff should recover from the defendants this sum of $1,000, with interest and costs. With this decision the plaintiff was not satisfied, and sued out the present writ of error.

With the exception of the usual formal parts, the record of this case contains only the pleadings, the judgment of the circuit court, a motion for a new trial, and an assignment of errors filed with the writ. It contains no exceptions or bill of exceptions of any kind, no equivalent therefor, no case stated, no special finding of facts, nothing whatever on which this Court can base a review of the case.

The pleadings are four: 1st, Petition of plaintiff setting forth the notes constituting the alleged indebtedness, with the credits upon them (Record, p.p 1, 2); 2d, Answer of defendants, containing a general denial of the claim and specially pleading the bar of the statute of limitations of the State of Texas (Record, pp. 4, 5); 3d, Supplemental petition of plaintiff, called a first supplemental petition, stating circumstances claimed to raise an estoppel against the plea of the statute of limitations, and to operate as a revival of the debt by a new promise; and to this supplemental petition are appended as exhibits copies of the notes in suit and of a deed of trust alleged to have been given to secure them (Record, pp. 5–11); 4th, Supplemental answer of defendants, styled a first supplemental answer, in which the defense of the statute of limitations is reasserted (Record, pp. 11, 12).

There then appears an agreement to waive a jury, and to submit the case to the court both "*on the questions of law and fact*" (Record, p. 12).

Thereupon the court determined "*on the pleadings*, EVIDENCE, *and argument of counsel*," 1st, That the notes sued on were barred by the statute of limitations; 2d, That the new promise claimed to have been made by the defendants applied only to the sum of $1,000, and no more; and for this sum of $1,000 accordingly the judgment was entered (Record, p. 13).

A motion for a new trial was made by the plaintiffs and overruled (Record, pp. 13, 14); and then this writ of error was sued out by them.

The assignment of errors, filed with the writ, sets forth five grounds of error—three of them based on the admission by the circuit court of the bar of the statute of limitations; the fourth upon the ruling of the circuit court as to the extent of the alleged new promise; and the fifth on the refusal of the motion for a new trial (Record, p. 19).

This is the whole record. Nowhere in it is there any bill of exceptions, or any substitute or equivalent for such a bill; or any evidence that any exception was at any time taken to the rulings of the court in the determination of the questions submitted. And if it be claimed that there are findings of fact by the court, which dispense with a bill of exceptions, the findings are general, and not special, and there is absolutely no ground in them for review by this Court.

II.

BRIEF OF ARGUMENT.

1.

The law (U. S. Rev. Stat., secs. 649, 700) requires that, when a jury is waived by the parties and a cause is submitted to the court for its determination without a jury, the rulings of the court, if it is desired to have a review of them here, must be excepted to at the time they are made and must be presented by a bill of exceptions, precisely as in a trial by jury; and this Court has repeatedly held that without such a bill of exceptions it cannot review the case.

Norris *vs.* Jackson, 9 Wall., 125.
Mercantile Insurance Co. *vs.* Folsom, 18 Wall., 237.
Cooper *vs.* Omohundro, 19 Wall., 65.
Otoe County *vs.* Baldwin, 111 U. S., 1.
Martinton *vs.* Fairbanks, 112 U. S., 670.
Santa Anna *vs.* Frank, 113 U. S., 339.
Boardman *vs.* Toffey, 117 U. S., 271.

As it must be admitted that there is no bill of exceptions here, the conclusion seems to be inevitable that there can be no review of this case by this Court.

2.

It is quite true, of course, that if there are special findings of fact by the court below, the equivalent of the special verdict of a jury, this Court may, without a bill of exceptions, examine whether the facts found are sufficient to support the judgment. It was so held in the case of *Tyug* vs. *Grinnell* (92 U. S., 467), and in other cases. But the finding here is not a special finding of facts; it is a general finding in favor of the defendants of the two issues made by them. The plea of the defendants, beyond the general issue, was the bar of the statute of limitations. To this there was a replication of a new promise. The defendants denied the new promise, and relied on the bar of the statute. The court found that the indebtedness was barred by the statute, and that there was no new promise, except as to a part of the debt. Most unquestionably this is a general finding in favor of the defendants, and not a special finding of facts. And it is the settled law that a general finding, as distinguished from a special finding of facts, is not open to review in this Court, except upon rulings made in the progress of the trial.

Jessup *vs.* United States, 106 U. S., 147.
The New Orleans, 106 U. S., 13.
Norris *vs.* Jackson, 9 Wall., 125, and cases above cited.

Possibly the best criterion by which to determine the correctness of our contention on this point is the fact that, upon the findings of the court in this case, the judgment rendered was absolutely inevitable. If the alleged indebtedness was barred by the statute of limitations, and had not been revived by any new promise, then most unquestionably there could have been no other judgment than one in favor of the defendants. A special finding of facts, like a special verdict, presumably implies some ground for difference of opinion in regard to the law applicable to the case.

A general finding of the issues in favor of one party or the other leaves no room for controversy; and the judgment must inevitably follow such general finding.

3.

The fact that there is a certain specified sum of $1,000 found by the court below to have been revived by a new promise does not turn the finding into a special finding, so as to give the plaintiff in error a standing here. If any one was aggrieved by that it was the defendants who were aggrieved; but they cannot have their grievance in that regard remedied here and they do not seek such remedy, although they seem to have contended in the court below for the total bar of the whole indebtedness by the statute of limitations and the absence of any new promise whatever, valid in law, to revive any part of it.

4.

It is suggested on behalf of the defendants in error that the terms of the submission of this cause to the court below constituted that court an *arbitrator* of the controversy, and that its decision under the circumstances affords no room for the appellate action of this Court. The submission was in the following terms: "We hereby agree to waive a jury in the above cause and submit the same to the court on the questions of law and fact" (Record, p. 12). In the case of *Graham* vs. *Bayne* (18 Howard, 60) it was held that a similar submission constituted the court or judge an arbitrator or referee, whose decision was final and not subject to review in this Court. And this ruling, so far as applicable to the present case, does not seem to be affected by the act of 1865, authorizing the waiver of a jury.

5.

Even if the defendants in error are mistaken upon these points and no sufficient ground has been shown for the dismissal of the writ of error, it is respectfully submitted that at least sufficient ground has been shown to justify the making of the motion and the joinder with it of a motion to affirm the judgment (*Walston* vs. *Nevin*, 128 U. S., 578), and that this latter motion should prevail.

That there was testimony taken outside of that made by the pleadings is evident from the decision of the court, which in terms purports to be based "on the pleadings, *evidence*, and argument of counsel." What this testimony was does not appear, and it is of no consequence, so far as these motions are concerned, for we are not now concerned with the merits of this case. The sufficiency of the testimony, whatever it was, to support the findings of the court is not now open to question. There are no exceptions to it. The findings of the court, if they are to be regarded as findings of fact, and whether they be general or special, are absolutely conclusive.

Now, if these findings of fact are to be regarded as general findings, as distinguished from those which are designated as special, in accordance with reason and authority they are not subject to review here. But if, on the contrary, they are to be considered in the proper sense as special findings of fact, the equivalent of the special verdict of a jury, and it is open to this Court to determine their sufficiency to support the judgment rendered upon them, then we respectfully submit that there is really no substantial question involved, and that the question of such sufficiency must be regarded as frivolous. Indeed, it seems impossible to present one more frivolous.

The findings of fact, under this theory, are two: 1st, that the notes in suit were barred by the statute of limitations; 2d, that there was no new promise to revive the debt,